

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT J. SMITH,	§	
	§	No. 42, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0312008370
Appellee.	§	

Submitted: February 16, 2011

Decided: February 22, 2011

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 22<sup>nd</sup> day of February 2011, it appears to the Court that:

(1) On January 28, 2011, the Court received the appellant's notice of appeal from the Superior Court's December 21, 2010 denial of his second motion for postconviction relief. On its face, the appeal was untimely filed. Pursuant to Supreme Court Rule 6, a timely notice of appeal from the December 21, 2010 order should have been filed on or before January 20, 2011.<sup>1</sup>

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<sup>1</sup> See Del. Supr. Ct. R. 6(a)(iii) (providing that an appeal from the denial of postconviction relief must be filed within thirty days after entry upon the docket of the Superior Court judgment or order).

(2) To invoke this Court’s appellate jurisdiction, a notice of appeal must be received by the Office of the Clerk of the Court within the applicable time period.<sup>2</sup> The Court cannot consider an untimely notice of appeal *unless* the appellant can demonstrate that the delay in filing the notice of appeal is attributable to court-related personnel.<sup>3</sup>

(3) On January 28, 2011, the Clerk issued a notice pursuant to Supreme Court Rule 29(b) directing that the appellant show cause why the appeal should not be dismissed as untimely filed. In response to the notice, the appellant, who is incarcerated, asks this Court to excuse the delay, explaining that he “sent [the notice of appeal] off on time,” specifically on January 14, 2011, six days prior to the January 20, 2011 filing deadline. According to the appellant, the envelope enclosing the appeal papers was not promptly handled by prison personnel and “sat in the officer’s desk until whenever it was sent,” which caused the appeal to be untimely filed.

(4) At the request of the Court, the appellee filed an answer to the appellant’s response to the notice to show cause. The appellee opposes a discharge of the notice to show cause on the basis that the untimeliness of the appellant’s appeal is not attributable to court-related personnel.

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<sup>2</sup> Del. Supr. Ct. R. 10(a).

<sup>3</sup> *Bey v. State*, 402 A.2d 362, 363 (Del. 1979).

(5) The appellee's position is correct. In Delaware, an appellant's incarcerated status does not excuse a failure to comply with the Court's jurisdictional requirement as to time.<sup>4</sup> Moreover, prison personnel are not court-related personnel.<sup>5</sup> Consequently, any delay allegedly caused by prison personnel cannot excuse an untimely appeal.

(6) In this case, there is nothing in the record before us indicating that the appellant's failure to file a timely notice of appeal is attributable to court-related personnel. Consequently, this case does not fall within the exception to the general rule that mandates the timely filing of a notice of appeal.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 29(b), that the within appeal is DISMISSED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>4</sup> "Time is a jurisdictional requirement." See *Carr v. State*, 554 A.2d 778, 779, 780 (Del. 1989) (declining to adopt a separate prison mailbox rule).

<sup>5</sup> *Drummond v. State*, 2010 WL 1463234 (Del. Supr.); *Nelson v. State*, 2004 WL 2297393 (Del. Supr.); *Dickens v. Costello*, 2004 WL 2239710 (Del. Supr.). Cf. *Deputy v. Roy*, 2004 WL 1535479 (Del. Supr.) (dismissing untimely appeal after concluding that "[a]ny delay in prison mail system cannot justify an enlargement of jurisdictional appeal period") (citing *Carr v. State*, 554 A.2d 778, 779 (Del. 1989)).